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Apr. 2

Mr. Ralph G. Carpenter, 2nd, Director
Fish and Game Department
State House Annex

Dear Sir:

At the recent Work Shop in Conway several questions were asked which I was not prepared at the time to answer. In the belief that the same would be helpful to your department, I have examined the law regarding these matters and forward my views as follows:

a.) An individual has been arrested for a Fish and Game violation. The nearest municipal court is in a county adjacent to that in which the violation occurred. The question is: if the defendant requested, may the officer take him for trial before the municipal court mentioned, although, as noted, such court lies in another county than that in which the violation occurred. The question is answered in the negative.

This result follows from the statute governing the jurisdiction of municipal courts. I quote R. L. c. 377, s. 15 as amended by laws 1943, c. 200:

> "Criminal Cases, Municipal Courts. Municipal courts shall have the powers of a justice of the peace and quorum throughout the state, and shall have original jurisdiction, subject to appeal, of all crimes and offenses committed within the confines of the city or town wherein such courts are located, or within any town in the same county which has no municipal court, or within any city or town in the same county in which vacancies exist in the offices of justice and special justice of the municipal court, which are punishable by a fine not exceeding five hundred dollars or imprisonment not exceeding one year, or both."

It is apparent from the foregoing that the territorial jurisdiction of the municipal court is limited. It has powers to try only those offenses

which are committed in the same county as that wherein the court is located.

In the discussion at the Work Shop it was suggested that the defendant might file a waiver which would permit his trial in a municipal court in another county. Consideration of the matter indicates that this is not so. It is true that while Art. 17th, part I of the Constitution gives a defendant a right to be tried in the county where he committed the offense, he may waive such a right, State v. Almy, 67 N. H. 274, and thereupon be tried in another county. But the court in the other county must have jurisdiction to try him. The Superior Court has such jurisdiction, since it has powers throughout the State. We noted above that the power of a municipal court is limited to the county in which it is located, and a waiver or request on the part of the defendant cannot add to the jurisdiction which the Legislature saw fit to confer on municipal courts. Shortly, the defendant can waive his right to be tried in the county where the offense occurred, but he cannot give power to a court to try him; only the Legislature can do so, and, in the case of municipal courts the Legislature has withheld power from such courts to try offenses committed outside the county.

b.) The question with what to do about the automobile of a defendant charged with or convicted of illegal night hunting in a case where such automobile is subject to forfeiture. Special reference was made to the case where defendant convicted in a municipal court has taken an appeal.

We must bear in mind as a basic consideration that the automobile belongs to the defendant, and that unless the officer deal with it under some proper authorization, the officer himself may be held a trespasser. Fortunately there is sufficient authority in the law to permit the officer to carry out his duty.

A study of the subject commences with R. L. c. 242, s. 6 which provides that "any person convicted of illegal night hunting shall forfeit" equipment used or usable in that activity "including any vehicle in which the same is being transported". The right of the State to cause a forfeiture, then, must follow a legal conviction of the violator. And since this necessarily includes a time-lapse, the essence of the problem is how to detain the vehicle until that right comes into being. The problem is further complicated by the fact that in the majority of instances where an automobile is the subject of an action for forfeiture, jurisdiction lies with the Superior Court only, while the person charged with illegal night hunting may be tried in the municipal court.

The procedure to be followed in connection with forfeitures is found in R. L. c. 432. Section 1 of that chapter reads as follows:

> "Seizure. Whenever personal property is forfeited for violation of law any officer or person by law authorized to seize the same may take and retain it until he shall deliver it to a proper officer having a warrant to detain it."

This statute is a rather ancient one, long before the office of Conservation Officer was established. The officer referred to in the statute last cited was, undoubtedly, the constable. However, I think it proper to consider that, in effect, the Conservation Officer has the power of a constable in respect to Fish and Game Violations, see R. L. c. 240, s. 25 I. Specifically, then, it would seem that a Conservation Officer is an "officer" within the provisions of R. L. c. 432, s. 1, and thus has the power to seize the personal property used in illegal night hunting, that is, the automobile, and to hold it until it is delivered to an officer having a warrant to detain it.

Such a warrant should be procured from the court which will be trying the action of forfeiture. This means, then, that the Conservation Officer upon seizure, and as far as possible as a part of the same act, should seek from the Superior Court a warrant directed to him or to some other officer directing him to hold the automobile until all matters looking to a conviction of the violator have been concluded. Such warrant would be broad enough to permit holding the vehicle pending appeal from the municipal court to the Superior Court and action thereon. Since the actual trial of the forfeiture case is a matter for the county solicitor, the assistance of that official should be requested as soon after the actual seizure as possible. It will be he, the county solicitor, who will request the Superior Court to issue the warrant metioned above. In my opinion, immediate action such as that described is required to prevent the Conservation Officer's being held for mishandling the property of another; if on the other hand, such action be taken, both the State and the Conservation Officer will be protected.

Another device which may be relied upon is that found in R. L. c. 424, s. 6, which reads as follows:

> "Goods Seized Without Warrant. An officer who shall find any implement, article or thing made, kept, used or designed to be used in violation of law or in the commission of an offense, in the possession of or belonging to a person arrested or liable to be arrested for such offense or violation of law shall bring such implement, article or thing before the justice or court having jurisdiction of the offense, who shall make such order respecting its custody or destruction as justice may require."

Since the automobile here is being used in the commission of a crime, its seizure under this statute is clearly justified. Consistently with the statute last quoted, the vehicle should be taken before the municipal court which is to try the violator for his offense. That court should be requested to issue a warrant directing the Conservation Officer or some other officer

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to hold the vehicle until the libel for forfeiture may be filed under chapter 432.

Such procedure would probably be the more convenient of the two methods set forth here, and would probably make it possible to having the car under order earlier than the first method described.

Very truly yours,

Warren E. Waters
Assistant Attorney General

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